

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 18, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2551-FT

Cir. Ct. No. 2011CV733

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CENTRAL BANK,

PLAINTIFF-RESPONDENT,

V.

LUKE J. DUNCAN,

DEFENDANT-APPELLANT,

HENNEPIN FACULTY ASSOCIATES AND CONSOLIDATED LUMBER CO.,

DEFENDANTS.

APPEAL from an order of the circuit court for Polk County:
JEFFERY ANDERSON, Judge. *Reversed and cause remanded for further proceedings.*

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve
Judge.

¶1 MANGERSON, J. Luke Duncan appeals an order granting Central Bank’s motion for summary judgment in this foreclosure action.¹ We conclude Central Bank failed to establish a prima facie case for summary judgment. The motion was supported only by an affidavit from Central Bank’s litigation attorney, which did not establish his personal knowledge of the described events. Accordingly, we reverse and remand for further proceedings.

BACKGROUND

¶2 Central Bank filed a motion for summary judgment of foreclosure on March 26, 2012. A memorandum of law accompanied the motion. As factual support, the memorandum exclusively relied on an affidavit by Joseph Paiement, Central Bank’s litigation attorney. Paiement averred he had reviewed the bank’s records and had “personal knowledge of the facts and figures reflected in this affidavit.” Paiement stated Duncan had executed a promissory note and mortgage on land in Polk County and had defaulted after the note and mortgage were assigned to Central Bank. Paiement also averred that “all of the allegations contained in plaintiff’s complaint herein are true and correct according to the records of plaintiff which affiant has in its possession.” Duncan opposed the motion, arguing Paiement’s affidavit was insufficient for lack of personal knowledge.

¶3 At a hearing on Central Bank’s motion, the circuit court did not directly address the sufficiency of Paiement’s affidavit. Instead, it cited the lack of contrary evidence presented by Duncan, observing, “There’s no affidavit, no

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

information provided by defendant that there's an actual issue of material fact. There are no facts left in issue for the Court to determine." The court then granted Central Bank's summary judgment motion.

DISCUSSION

¶4 We review a grant of summary judgment de novo, employing the same methodology as the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. First, we examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. *Id.* If so, we then examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial. *Id.* A party is entitled to summary judgment if there is no genuine issue of material fact and that party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶5 Affidavits supporting summary judgment "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). "Portions of affidavits which are made by persons who do not have personal knowledge or which contain allegations of ultimate facts, conclusions of law or anything other than evidentiary facts do not meet the statutory requirements and will be disregarded." *Hopper v. City of Madison*, 79 Wis. 2d 120, 130, 256 N.W.2d 139 (1977).

¶6 Duncan contends that Paiement lacks personal knowledge of the facts set forth in his affidavit. In his affidavit, Paiement claims to have personal knowledge of the execution of the promissory note and mortgage, their assignment to Central Bank, the circumstances surrounding Duncan's default, Central Bank's notice of default to Duncan, and Duncan's failure to cure. Yet, as the sole basis

for this knowledge, Paiement simply avers that he is one of Central Bank’s attorneys in this litigation and has reviewed Central Bank’s records in connection with the representation.

¶7 “Personal knowledge” means the witness perceived the event through one of the five senses and can accurately narrate the memory of those perceptions in court. *See* 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 602.1 (3d ed. 2008). Although Paiement avers that he has personal knowledge of the pertinent events, there is no basis in his affidavit for concluding that is so. His affidavit cites his involvement in the current litigation as the sole basis for his knowledge. Thus, any knowledge of the described events was necessarily obtained by post hoc document review.

¶8 Central Bank does not appear to argue Paiement had the requisite personal knowledge. Instead, Central Bank contends that an attorney may submit an affidavit on behalf of a corporation. While this is true, it is an incomplete statement of the law regarding attorney submissions. Because the cases Central Bank cites roughly follow a chronological pattern, we shall address them in that order.

¶9 The earliest case cited by Central Bank, *Monroe County Finance Co. v. Thomas*, 243 Wis. 568, 11 N.W.2d 190 (1943), involved a breach of contract claim by an auction company, Monroe County Finance Co., after its client conducted the sale using a different corporation. Monroe’s attorney submitted an affidavit in support of Monroe’s summary judgment motion. The supreme court sanctioned this practice, observing that the relevant facts—i.e. those facts constituting breach—“were not within the knowledge of any one person” in the corporation. *Id.* at 570-71. While the court acknowledged the affidavit did not

establish that the attorney had personal knowledge of the facts, it deemed this irrelevant, as the complaint was verified by an officer of the corporation and the defendant had not established a defense in his answer. *Id.* Monroe would have been entitled to judgment even if no supporting affidavit had been filed. *Id.* Thus, *Monroe* does not indicate an affidavit filed without personal knowledge is sufficient; rather, in some cases, the deficiency may not matter.

¶10 Next, Central Bank cites *Clark v. London & Lancashire Indemnity Co. of America*, 21 Wis. 2d 268, 124 N.W.2d 29 (1963). That case involved a summary judgment motion by the defendant insurer, which was accompanied by an affidavit from defense counsel. The motion was brought under the old summary judgment statute, WIS. STAT. § 270.635(2) (1961), which required an “affidavit of the [defendant] ... that he believes ... that the action has no merit.” *Clark*, 21 Wis. 2d at 272. The supreme court rejected the plaintiff’s argument that an affidavit is defective simply because it is provided by a corporate party’s attorney, citing *Monroe*. *Clark*, 21 Wis. 2d at 272. However, the *Clark* court did not issue a blanket approval of all affidavits made by an attorney representing a corporate client. Instead, it observed that the old summary judgment statute essentially called for a legal opinion that the action had no merit. Accordingly, “[t]his affidavit does not stand in the same category as affidavits which aver certain specific evidentiary facts. These latter must be made on personal knowledge and not information and belief.” *Id.* at 273. Affidavits like the one at issue in *Clark* are no longer required; instead, all affidavits now must be made on personal knowledge and must set forth evidentiary facts. See WIS. STAT. § 802.08(3).

¶11 The next decision addressing an affidavit filed by an attorney on behalf of a corporate client involved an insurance policy dispute. In *Kroske v.*

Anaconda American Brass Co., 70 Wis. 2d 632, 634-35, 235 N.W.2d 283 (1975), the affidavit recited portions of the policy, described the circumstances surrounding the accident, and opined that there was no coverage. Contrary to Central Bank’s assertion, the court did not approve this affidavit; in fact, it struck the portions that contravened the rules requiring personal knowledge of evidentiary facts. *Id.* at 640-41. The court simply concluded that the affidavit’s deficiencies did not require it to be completely disregarded; “[r]ather, the insufficient allegations will not support the ruling sought.” *Id.* at 641. It also cited *Monroe* and *Clark*, observing that an attorney’s affidavit is not per se improper. *Kroske*, 70 Wis. 2d at 641. The upshot of these cases and *Kroske* is that an attorney may submit an affidavit, but only those portions alleging evidentiary facts and supported by personal knowledge will be considered on a motion for summary judgment.

¶12 We turn, then, to the primary case relied on by Central Bank, *State Bank of La Crosse v. Elsen*, 128 Wis. 2d 508, 383 N.W.2d 916 (Ct. App. 1986). Central Bank apparently believes *Elsen*, a foreclosure action, is on all fours with this case, asserting that case deemed a bank attorney’s affidavit sufficient to establish a prima facie case in favor of foreclosure. Central Bank has completely confused the facts of *Elsen*, though. There, the bank’s summary judgment motion was supported by the affidavit of Dean Olson, a bank officer, who described the circumstances surrounding the execution and default of several loans. *Id.* at 514. It was *this* affidavit—from a bank officer—that, standing alone, set forth evidentiary facts which established a prima facie case in favor of foreclosure. *Id.* The defense attorney then responded with his own affidavit, the relevant portions of which simply quoted deposition testimony. *Id.* at 514-15. Though we did not directly address the issue, there is no indication the defense attorney’s affidavit

was inconsistent with *Monroe*, *Clark*, and *Kroske*. In short, *Elsen* does not provide cover for an affidavit whose averments are not based on personal knowledge.

¶13 Central Bank also cites *Miller Brands-Milwaukee, Inc. v. Case*, 156 Wis. 2d 800, 457 N.W.2d 896 (Ct. App. 1990). The supreme court reversed the court of appeals' *Miller Brands* decision on direct review. See *Miller Brands-Milwaukee, Inc. v. Case*, 162 Wis. 2d 684, 470 N.W.2d 290 (1991). In any event, there we simply observed that no blanket rule prohibits an attorney from submitting an affidavit on a corporate client's behalf. *Miller Brands*, 156 Wis. 2d at 806. We also concluded that several portions of the attorney's affidavit were insufficient because they did not contain evidentiary facts. *Id.* at 807. The remaining averments, which described a meeting between Miller's attorneys and the Department of Revenue, as well as allegedly offending trade practices, were permissible. *Id.*

¶14 In sum, Paiement's affidavit was insufficient to establish a prima facie case for a summary judgment. The affidavit does not establish that its averments are derived from the affiant's personal knowledge.²

² Even if it did establish personal knowledge, Attorney Paiement would face an additional obstacle to his continued representation in this matter. Supreme Court rules generally forbid a lawyer from acting as an advocate "at a trial in which the lawyer is likely to be a necessary witness." SCR 20:3.7. This is because the roles are associated with different expectations; a witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. SCR 20:3.7, cmt. 2, Advocate-Witness Rule. "It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." *Id.* This is precisely our problem with Paiement's affidavit.

By the Court.—Order reversed and cause remanded for further proceedings.

Recommended for publication in the official reports.

